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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8

9 Jonathan M. Arther,

No. CV 20-00189-PHX-JAT (JFM)

10 Plaintiff,

11 v.

12 Corizon Health, Inc., et al.,

13

14 Defendants.

15

16 **ORDER**

17 On January 24, 2020, Plaintiff Jonathan M. Arther, who is not in custody, filed a
18 pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed
19 In District Court Without Prepaying Fees and Costs. In a February 14, 2020 Order, the
20 Court granted the Application to Proceed and dismissed the Complaint because Plaintiff
21 had failed to state a claim. The Court gave Plaintiff thirty days to file an amended
22 complaint that cured the deficiencies identified in the Order.

23 In a March 27, 2020 Order, the Court granted Plaintiff's March 23, 2020 letter
24 seeking an extension of time to file his first amended complaint. On April 23, 2020,
25 Plaintiff filed his First Amended Complaint. In an April 29, 2020 Order, the Court
26 dismissed the First Amended Complaint because Plaintiff had failed to state a claim and
27 gave Plaintiff thirty days to file a second amended complaint that cured the deficiencies
28 identified in the Order.

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1 The Clerk of Court mailed the Order to Plaintiff using the address listed at the top
 2 of Plaintiff's First Amended Complaint instead of Plaintiff's address of record. The Order,
 3 therefore, was thrice returned to the Court as undeliverable. As a result, the Clerk of Court
 4 discontinued mailing documents to Plaintiff.

5 On June 1, 2020, the Clerk of Court entered a Judgment of dismissal with prejudice
 6 because Plaintiff had failed to comply with the April 29, 2020 Order. The Judgment was
 7 not mailed to Plaintiff because the Clerk of Court had discontinued mailing documents to
 8 Plaintiff.

9 On October 15, 2020, Plaintiff, through counsel, filed a Motion for Relief From
 10 Judgment. In an October 22, 2020 Order, the Court granted the Motion for Relief From
 11 Judgment, vacated the Judgment, and gave Plaintiff thirty days to file a second amended
 12 complaint that cured the deficiencies identified in the April 29, 2020 Order.

13 On November 20, 2020, Plaintiff, through counsel, filed a Second Amended
 14 Complaint (Doc. 17).¹ The Court will dismiss the Second Amended Complaint with leave
 15 to amend.

16 **I. Statutory Screening of In Forma Pauperis Complaints**

17 Pursuant to 28 U.S.C. § 1915(e)(2), in a case in which a plaintiff has been granted
 18 in forma pauperis status, the Court shall dismiss the case “if the court determines that . . .
 19 (B) the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may
 20 be granted; or (iii) seeks monetary relief against a defendant who is immune from such
 21 relief.”

22 A pleading must contain a “short and plain statement of the claim *showing* that the
 23 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 24 not demand detailed factual allegations, “it demands more than an unadorned, the-
 25 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 26 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 27 conclusory statements, do not suffice.” *Id.*

¹ Plaintiff misidentifies the document as his “Third” Amended Complaint.

1 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 2 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 3 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 4 that allows the court to draw the reasonable inference that the defendant is liable for the
 5 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 6 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 7 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 8 allegations may be consistent with a constitutional claim, a court must assess whether there
 9 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

10 Plaintiff’s Second Amended Complaint will be dismissed for failure to state a claim,
 11 but because it may possibly be amended to state a claim, the Court will dismiss it with
 12 leave to amend.

13 **II. Second Amended Complaint**

14 In his Second Amended Complaint, Plaintiff sues Defendants Arizona Department
 15 of Corrections (ADC), ADC Director David Shinn, the Arizona State Prison Complex
 16 (ASPC)-Florence, two unidentified ADC Contract Physicians, one of the unidentified ADC
 17 Contract Physician’s “Business Entity,” Corizon Health, David Ellison, Southwestern Eye
 18 Center, Doctors Adelberg and Heller, a “business entity” identified as “Eye Dr. of AZ,”
 19 Doe Physicians 1-10, Doe Registered Nurses 1-10, Doe Healthcare Providers 1-10, Doe
 20 Business Entities 1-10, Doe Custody Officers 1-10, and Doe Individuals 1-10. Plaintiff
 21 seeks monetary damages, his costs of suit, his attorney’s fees and costs, and prejudgment
 22 interest.

23 Plaintiff alleges he suffered trauma to his left eye prior to being incarcerated in
 24 ADC, began having increased pressure in his left eye and blurry vision while confined in
 25 the Arizona State Prison-Phoenix West; and “required treatment to address a macular hole
 26 in his left eye.” He contends he submitted a health needs request and was transported to
 27 Defendant Southwestern Eye Center on February 24, 2017, where he saw Defendant
 28 Adelberg. Plaintiff asserts Defendant Adelberg diagnosed him with a moderately sized

1 macular hole; recommended surgical intervention, prescribed one medication for Plaintiff
2 to take for a week, starting the day before surgery, and another medication for Plaintiff to
3 take until it was gone, starting the day after surgery; and indicated in his notes that the
4 prescriptions were “sent with inmate paperwork.” Defendant Adelberg performed an eye
5 surgery on March 29, 2017. Plaintiff contends that after the surgery, he had severe pain
6 and significant pressure in his left eye, and Defendant Adelberg prescribed additional
7 medications to decrease the pressure in his eye.

8 Plaintiff alleges he was transferred to Defendant ASPC-Florence, but the medication
9 Defendant Adelberg prescribed was not transported with him and, after he arrived at
10 ASPC-Florence, Defendants Doe Custody Officers, Doe Nurses, and Doe Healthcare
11 Providers failed to provide him with the medication Defendant Adelberg prescribed. He
12 asserts he was experiencing severe pain, sensitivity to light, and headaches. Plaintiff
13 contends that after he submitted health needs requests for his medication, Defendants Doe
14 Custody Officers, Doe Nurses, and a Doe Healthcare Providers gave him different
15 medication that worsened his condition. Plaintiff claims he continued to experience
16 significant pain, sensitivity to light, headaches, loss of vision, throbbing, swelling, and
17 tearing.

18 Plaintiff alleges he was seen on June 16, 2017, and his eye pressure was increasing.
19 He claims he was prescribed additional medication for swelling and it was recommended
20 that he have a follow-up appointment with a glaucoma specialist. Plaintiff contends he
21 submitted multiple health needs request forms to corrections officers, but Defendants Doe
22 Custody Officers, Doe Nurses, and Doe Healthcare Providers: (1) did not provide the
23 correct medication to treat Plaintiff’s condition and prevent it from worsening, (2) failed
24 to provide medication and treatment, (3) did not treat Plaintiff in a timely manner,
25 (4) refused to respond to Plaintiff’s health needs request forms, and (5) punished Plaintiff
26 for submitting multiple heath needs request forms by withholding his medication and
27 forcing him to stand outside, without clothing, during the winter.

28

1 Plaintiff contends he saw a healthcare provider employed by Defendant Corizon in
2 early 2018, and the healthcare provider recommended a second eye surgery. He claims he
3 had a second eye surgery and, after the surgery, continued to submit health needs request
4 forms for treatment and medication. He contends he did not receive adequate treatment
5 after his second surgery, his left eye is now completely blind and inoperable, and he
6 continues to have significant pain, sensitivity to light, headaches, loss of vision, throbbing,
7 swelling, and tearing

8 Plaintiff raises a state-law tort claim, asserting that he suffered significant pain and
9 permanent vision loss because Defendants Shinn and Corizon failed to provide him with
10 adequate medical and health services when they “failed to provide the correct medication”
11 and “failed to provide treatment . . . for an extended prior of time.”

12 Plaintiff alleges Defendants, in their individual and official capacities, violated his
13 Eighth Amendment rights because they were deliberately indifferent to his serious medical
14 needs. He contends Defendants “knew of and disregarded an excessive risk” to his health
15 and safety and deprived him of adequate medical care when they failed to provide
16 medication and treatment, ignored his health needs requests seeking medication and
17 treatment, and punished or reprimanded him for submitting health needs requests. Plaintiff
18 also asserts Defendants, through their observations of Plaintiff’s medical conditions and
19 symptoms and their communications with ADC officials, became aware of Plaintiff serious
20 medical needs and the negligent and constitutionally inadequate medicate care he was
21 receiving during his medical visits with Defendants Doe Healthcare Providers. He alleges
22 Defendants had a duty to provide competent and constitutionally adequate medical care,
23 but failed to do so, in conscious disregard of an excessive risk to Plaintiff’s health and
24 safety.

25 Plaintiff raises a claim of “liability based on policy, practice, custom.” He asserts
26 Defendants “instituted, promulgated, and maintained patterns, practices, customs, usages,
27 policies and procedures, including medical policies” to provide inmates access to and the
receipt of medical services necessary to maintain their physical health. Plaintiff claims

1 Defendants “were on active or constructive notice that certain omissions in the patterns,
 2 practices, [and] policies, as described herein, would likely result in constitutional violations
 3 by [Defendant ADC’s] employees and agents who carried out the deficient medical
 4 treatment” and would result in the denial or unnecessary delay of adequate medical care.
 5 Specifically, Plaintiff asserts that Defendant ADC’s employees and agents are required to
 6 respond to all health needs requests, but Defendants routinely ignored Plaintiff’s health
 7 needs requests. He contends he advised Defendants Doe Custody Officers, Doe Nurses,
 8 Doe Healthcare Providers, and Defendant Corizon’s healthcare providers that he was not
 9 receiving timely medical treatment and medication, his health needs requests were being
 10 ignored, and he was being punished for submitting health needs requests, but Defendants
 11 ASPC-Florence, Corizon, Doe Custody Officers, Doe Nurses, and Doe Healthcare
 12 Providers lacked “adequate oversight” and “sufficient communication” of “their medical
 13 patterns, practices, customs, usages, policies, and procedures” and “clearly have
 14 deficiencies in grievance procedures for inmates to request medical treatment.”

15 **III. Discussion of Second Amended Complaint**

16 **A. Federal Claims**

17 To state a valid claim under § 1983, plaintiffs must allege that they suffered a
 18 specific injury as a result of specific conduct of a defendant and show an affirmative link
 19 between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362,
 20 371-72, 377 (1976). There is no respondeat superior liability under § 1983, and therefore,
 21 a defendant’s position as the supervisor of persons who allegedly violated Plaintiff’s
 22 constitutional rights does not impose liability. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658
 23 (1978); *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992); *Taylor v. List*, 880 F.2d
 24 1040, 1045 (9th Cir. 1989). “Because vicarious liability is inapplicable to . . . § 1983 suits,
 25 a plaintiff must plead that each Government-official defendant, through the official’s own
 26 individual actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676. “A plaintiff must
 27 allege facts, not simply conclusions, that show that an individual was personally involved
 28

1 in the deprivation of his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.
 2 1998).

3 **1. Defendant ADC**

4 The Arizona Department of Corrections is not a proper Defendant. Under the
 5 Eleventh Amendment to the Constitution of the United States, a state or state agency may
 6 not be sued in federal court without its consent. *Pennhurst State Sch. & Hosp. v.*
 7 *Halderman*, 465 U.S. 89, 100 (1984); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).
 8 Furthermore, “a state is not a ‘person’ for purposes of section 1983. Likewise ‘arms of the
 9 State’ such as the Arizona Department of Corrections are not ‘persons’ under section
 10 1983.” *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991) (citation
 11 omitted). Therefore, the Court will dismiss Defendant Arizona Department of Corrections.

12 **2. Defendant ASPC-Florence**

13 Section 1983 imposes liability on any “person” who violates an individual’s federal
 14 rights while acting under color of state law. Congress intended municipalities and other
 15 local government units to be included among those persons to whom § 1983 applies.
 16 *Monell*, 436 U.S. at 689-90. However, ASPC-Florence is a building or collection of
 17 buildings, not a person or legally created entity capable of being sued. Thus, the Court will
 18 dismiss Defendant ASPC-Florence.

19 **3. Eighth Amendment Claim**

20 Not every claim by a prisoner relating to inadequate medical treatment states a
 21 violation of the Eighth Amendment. To state a § 1983 medical claim, a plaintiff must show
 22 (1) a “serious medical need” by demonstrating that failure to treat the condition could result
 23 in further significant injury or the unnecessary and wanton infliction of pain and (2) the
 24 defendant’s response was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
 25 Cir. 2006).

26 “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d
 27 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both
 28 know of and disregard an excessive risk to inmate health; “the official must both be aware

1 of facts from which the inference could be drawn that a substantial risk of serious harm
 2 exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
 3 Deliberate indifference in the medical context may be shown by a purposeful act or failure
 4 to respond to a prisoner’s pain or possible medical need and harm caused by the
 5 indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may also be shown when a
 6 prison official intentionally denies, delays, or interferes with medical treatment or by the
 7 way prison doctors respond to the prisoner’s medical needs. *Estelle v. Gamble*, 429 U.S.
 8 97, 104-05 (1976); *Jett*, 439 F.3d at 1096.

9 Deliberate indifference is a higher standard than negligence or lack of ordinary due
 10 care for the prisoner’s safety. *Farmer*, 511 U.S. at 835. “Neither negligence nor gross
 11 negligence will constitute deliberate indifference.” *Clement v. Cal. Dep’t of Corr.*, 220 F.
 12 Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d 458,
 13 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or “medical malpractice”
 14 do not support a claim under § 1983). “A difference of opinion does not amount to
 15 deliberate indifference to [a plaintiff’s] serious medical needs.” *Sanchez v. Vild*, 891 F.2d
 16 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to
 17 state a claim against prison officials for deliberate indifference. *See Shapley v. Nev. Bd. of*
 18 *State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be
 19 substantial. The action must rise to a level of “unnecessary and wanton infliction of pain.”
 20 *Estelle*, 429 U.S. at 105.

21 Plaintiff has simply made vague and conclusory allegations against groups of
 22 Defendants, without any factual specificity as to what any particular Defendant did or
 23 failed to do. This is insufficient. *See Marcilis v. Twp. of Redford*, 693 F.3d 589, 596 (6th
 24 Cir. 2012) (upholding dismissal of *Bivens* complaint that referred to all defendants
 25 “generally and categorically” because the plaintiff had failed to “allege, with particularity,
 26 facts that demonstrate what *each* defendant did to violate the asserted constitutional right.”)
 27 (quoting *Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008)); *Robbins v. Oklahoma*,
 28 519 F.3d 1242, 1250 (10th Cir. 2008) (“Given the complaint’s use of either the collective

1 term ‘Defendants’ or a list of the defendants named individually but with no distinction as
 2 to what acts are attributable to whom, it is impossible for any of these individuals to
 3 ascertain what particular unconstitutional acts they are alleged to have committed.”). Thus,
 4 the Court will dismiss without prejudice Plaintiff’s Eighth Amendment medical care claim.

5 **4. Policy Claim**

6 First, although § 1983 “authorizes prisoners to sue municipal entities for damages
 7 if the enforcement of a municipal policy or practice, or the decision of a final municipal
 8 policymaker, caused the Eighth Amendment violation,” these claims “can’t be brought
 9 against states, which are protected by the Eleventh Amendment.” *Peralta v. Dillard*, 744
 10 F.3d 1076, 1083-84 (9th Cir. 2014). Plaintiff, therefore, cannot bring a damages claim
 11 against Defendant State of Arizona, or its employees in their official capacities, based on
 12 a policy, practice, or custom. *See Hafer v. Melo*, 502 U.S. 21, 27 (1991) (“State officials
 13 sued for damages in their official capacity are not ‘persons’ for purposes of the suit because
 14 they assume the identity of the government that employs them.”).

15 Second, to state a claim under § 1983 against a private entity performing a
 16 traditional public function, such as providing medical care to prisoners, a plaintiff must
 17 allege facts to support that his constitutional rights were violated as a result of a policy,
 18 decision, or custom promulgated or endorsed by the private entity. *See Tsao v. Desert*
 19 *Palace, Inc.*, 698 F.3d 1128, 1138-39 (9th Cir. 2012); *Buckner v. Toro*, 116 F.3d 450, 452
 20 (11th Cir. 1997) (per curiam). A plaintiff must allege the specific policy or custom and
 21 how it violated his constitutional rights. A private entity is not liable merely because it
 22 employs persons who allegedly violated a plaintiff’s constitutional rights. *See Tsao*, 698
 23 F.3d at 1139; *Buckner*, 116 F.3d at 452. Plaintiff’s allegations regarding a policy, practice,
 24 or custom are vague and conclusory and in no way suggest that any of the conduct
 25 described in the Second Amended Complaint was the result of a specific policy or custom
 26 of Defendant Corizon.

27 Thus, the Court will dismiss without prejudice Plaintiff’s policy, practice, and
 28 custom claim.

B. State Law Claim

2 The Court will not exercise supplemental jurisdiction over Plaintiff's state-law
3 claim because Plaintiff's federal claims have been dismissed. *See Ove v. Gwinn*, 264 F.3d
4 817, 826 (9th Cir. 2001) ("A court may decline to exercise supplemental jurisdiction over
5 related state-law claims once it has 'dismissed all claims over which it has original
6 jurisdiction.'" (quoting 28 U.S.C. § 1367(c)(3))); *Gini v. Las Vegas Metro. Police Dep't*,
7 40 F.3d 1041, 1046 (9th Cir. 1994) (when federal law claims are eliminated before trial,
8 the court generally should decline jurisdiction over state law claims and dismiss them
9 without prejudice). Thus, the Court will dismiss without prejudice Plaintiff's state law
10 claim.²

11 | IV. Leave to Amend

12 For the foregoing reasons, Plaintiff's Second Amended Complaint will be dismissed
13 for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff may
14 submit a third amended complaint to cure the deficiencies outlined above.

15 A third amended complaint supersedes the original Complaint and prior Amended
16 Complaints. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios*
17 *v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court
18 will treat the original Complaint and prior Amended Complaints as nonexistent. *Ferdik*,
19 963 F.2d at 1262. Any cause of action that was raised in the original Complaint or a prior
20 Amended Complaint and that was voluntarily dismissed or was dismissed without
21 prejudice is waived if it is not alleged in a third amended complaint. *Lacey v. Maricopa*
22 *County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

23 If Plaintiff files a third amended complaint, Plaintiff must write short, plain
24 statements telling the Court: (1) the constitutional right Plaintiff believes was violated;
25 (2) the name of the Defendant who violated the right; (3) exactly what that Defendant did

1 or failed to do; (4) how the action or inaction of that Defendant is connected to the violation
2 of Plaintiff's constitutional right; and (5) what specific injury Plaintiff suffered because of
3 that Defendant's conduct. *See Rizzo*, 423 U.S. at 371-72, 377.

4 Plaintiff must repeat this process for each person he names as a Defendant. If
5 Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific
6 injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for
7 failure to state a claim. **Conclusory allegations that a Defendant or group of**
8 **Defendants has violated a constitutional right are not acceptable and will be**
9 **dismissed.**

10 If Plaintiff does not know the names of individual Defendants, he must list the
11 individual unknown Defendants as Defendant John (or Jane) Doe 1, John Doe 2, and so on
12 in the caption of his third amended complaint. In the body of the third amended complaint,
13 Plaintiff must allege facts to support **how each particular Doe Defendant** violated
14 Plaintiff's rights. It is insufficient to simply list categories of Defendants (such as
15 "Detention Officers") and make conclusory allegations against them as a group.

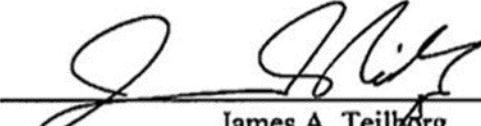
16 **IT IS ORDERED:**

17 (1) The Second Amended Complaint (Doc. 17) is **dismissed** for failure to state
18 a claim. Plaintiff has **30 days** from the date this Order is filed to file a third amended
19 complaint in compliance with this Order.

20 (2) If Plaintiff fails to file a third amended complaint within 30 days, the Clerk
21 of Court must, without further notice, enter a judgment of dismissal of this action with
22 prejudice and deny any pending unrelated motions as moot.

23 Dated this 3rd day of December, 2020.

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James A. Teilborg
Senior United States District Judge